

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER



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ARIZONA CORPORATION COMMISSION

ORIGINAL

Arizona Corporation Commission

DOCKETED

DEC 17 2002

DATE: NOVEMBER 20, 2002

DOCKET NO: W-04052A-01-0794

TO ALL PARTIES:

DOCKETED BY	
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Enclosed please find the recommendation of Administrative Law Judge Teena Wolfe. The recommendation has been filed in the form of an Opinion and Order on:

RED ROCK WATER COOPERATIVE, INC.
(ADJUDICATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

DECEMBER 2, 2002

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

DECEMBER 17, 2002 and DECEMBER 18, 2002

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250.

A handwritten signature in black ink, appearing to read "Brian C. McNeil".

BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL
CHAIRMAN

3 JIM IRVIN
COMMISSIONER

4 MARC SPITZER
COMMISSIONER

5
6 IN THE MATTER OF THE APPLICATION OF
RED ROCK WATER COOPERATIVE, INC. FOR
7 ADJUDICATION THAT IT IS NOT A PUBLIC
SERVICE CORPORATION.

DOCKET NO. W-04052A-01-0794

8 **OPINION AND ORDER**

9 DATE OF HEARING: February 5, 2002

10 PLACE OF HEARING: Phoenix, Arizona

11 ADMINISTRATIVE LAW JUDGE: Teena Wolfe

12 APPEARANCES: Mr. Steven R. Owens, Law Office of Steven R. Owens,
13 PC, and Ms. Elizabeth A. McFarland, on behalf of Red
14 Rock Water Cooperative, Inc.;

15 Ms. Deborah A. Dobson, *in propria persona*; and

16 Mr. Timothy J. Sabo, Staff Attorney, Legal Division, on
17 behalf of the Utilities Division of the Arizona
Corporation Commission.

18 **BY THE COMMISSION:**

19 On October 10, 2001, Red Rock Water Cooperative, Inc. ("Red Rock" or "Applicant") filed
20 with the Arizona Corporation Commission ("Commission") an application for adjudication that it is
21 not a public service corporation under Arizona law ("Application"). Red Rock is an Arizona
22 nonprofit corporation formed to maintain and manage a private well and domestic water supply
23 system that provides water service to eleven residential properties located approximately 7 miles
24 southwest of Sedona, to the south of State Highway 89A, in Yavapai County, Arizona.

25 On November 9, 2001, a Procedural Order was issued in this matter setting the matter for
26 hearing and requiring public notice of the application to be provided to each property owner in the
27 requested adjudication area.
28

1 On November 19, 2001, Applicant filed its Certification of Mailing verifying that notice of
2 the application and the hearing, and of the opportunity to intervene, had been mailed to all property
3 owners in the requested adjudication area.

4 No intervention requests were received prior to the hearing.

5 On January 11, 2002, the Utilities Division Staff ("Staff") filed its Staff Report in this matter
6 recommending that the Commission adjudicate Applicant not a public service corporation.

7 Written public comments from Ms. Deborah A. Dobson were filed in this docket on October
8 12, 2001, October 26, 2001 and January 11, 2002.

9 A hearing on the application was held as scheduled on February 5, 2002 before a duly
10 authorized Administrative Law Judge of the Commission. Applicant and Staff appeared through
11 counsel and presented evidence. No persons appeared at the hearing to provide public comment. At
12 the close of the hearing, the matter was taken under advisement, and a Proposed Opinion and Order
13 was docketed on May 21, 2002.

14 Further written comments, objecting to the Proposed Opinion and Order, were filed by Ms.
15 Dobson on May 29, 2002.

16 The May 21, 2002 Proposed Opinion and Order was considered, but not voted upon, at an
17 Open Meeting of the Commission on June 4, 2002. On June 5, 2002, a Procedural Order was issued
18 in this matter scheduling a procedural conference for June 13, 2002 to discuss the procedural posture
19 of this case.

20 On June 12, 2002, Applicant filed a Supplemental Submission in Support of its Application.
21 On June 13, 2002, Deborah A. Dobson filed a Motion to Intervene in this docket. The procedural
22 conference was held as scheduled on June 13, 2002. Ms. Dobson attended the procedural conference
23 and was granted late intervention in this matter. At the procedural conference, the parties agreed that
24 it would be appropriate to establish a briefing schedule to allow the parties to address legal issues and
25 provide further comment.

26 Pursuant to the procedural schedule set forth in the Commission's June 26, 2002 Procedural
27 Order, Staff filed its brief on July 18, 2002, and Applicant and Ms. Dobson filed responsive briefs on
28 July 26, 2002. In addition, Applicant filed, on June 12, 2002, a Supplemental Submission in Support

1 of its Application. On July 26, 2002, Applicant filed a Second Supplemental Submission in Support
2 of its Application.

3 * * * * *

4 Having considered the entire record herein and being fully advised in the premises, the
5 Commission finds, concludes and orders that:

6 **FINDINGS OF FACT**

7 1. Red Rock is an Arizona nonprofit corporation formed to maintain and manage a
8 private well and domestic water supply system that provides water service to eleven residential
9 properties located approximately 7 miles southwest of Sedona, to the south of State Highway 89A, in
10 Yavapai County, Arizona.

11 2. On October 10, 2001, Red Rock filed with the Commission an application for
12 adjudication that it is not a public service corporation under Arizona law.

13 3. On October 12, 2001, and October 26, 2001, correspondence from Ms. Deborah
14 Dobson, who is a member of Red Rock, was filed in this docket. The correspondence included a
15 copy of an October 6, 2001 letter from Ms. Dobson to the other members of Red Rock, in which Ms.
16 Ms. Dobson stated that she had not signed either the petition for approval of Red Rock's
17 incorporation, or the petition for approval of Red Rock's application for adjudication that it is not a
18 public service corporation. The October 6, 2001 letter outlined Ms. Dobson's concerns that she was
19 not provided with documentation for system repairs, her concerns regarding attorney's fees incurred
20 by Red Rock associated with its incorporation, and concerns with a proposed increase in the water
21 rates for Red Rock's members.

22 4. On November 9, 2001, a Procedural Order was issued in this matter setting the matter
23 for hearing and requiring public notice of the application to be provided to each property owner in the
24 requested adjudication area.

25 5. On November 19, 2001, Applicant filed its Certification of Mailing verifying that
26 notice of the application and the hearing, in the form required by the November 9, 2001 Procedural
27 Order, had been mailed to all property owners in the requested adjudication area, including Ms.
28 Dobson. The notice provided instructions for filing a written motion to intervene with the

1 Commission, and provided an intervention deadline of December 19, 2001.

2 6. No motions to intervene were filed prior to the hearing.

3 7. On January 11, 2002, Ms. Dobson filed a letter in this docket expressing her concerns
4 with Red Rock's failure to respond to questions she posed at an annual meeting concerning the cause
5 of a well breakdown the past summer, and what bills were incurred to repair the well. The letter also
6 expressed Ms. Dobson's concerns with Red Rock's decision to incorporate, and to incur the
7 associated attorney's fees, and her concerns about a vote by Red Rock's members in favor of adding
8 an assessment to their water bills.

9 8. Also on January 11, 2002, Staff filed a Staff Report on this matter recommending
10 approval of the application following a hearing.

11 9. On January 14, 2002, Staff filed in this docket a list of witnesses it planned to call to
12 testify at the February 5, 2002 hearing and a description of their areas of testimony.

13 10. On January 25, 2002, Red Rock filed in this docket a list of witnesses it planned to call
14 to testify at the February 5, 2002 hearing, and a description of their areas of testimony.

15 11. The hearing on this matter was held as scheduled on February 5, 2002. Red Rock and
16 Staff appeared and presented evidence. No members of the public were present to provide public
17 comment.

18 12. In Commission Decision No. 55568 (May 7, 1987), the Commission issued a policy
19 directive regarding applications for adjudication not a public service corporation, and provided the
20 following criteria for evaluation of such applications:

- 21
- 22 1) the application must be submitted by a non-profit homeowners association;
 - 23 2) the application is a bona fide request by a majority of the membership of the
24 association through a petition signed by 51 percent or more of the then-
25 existing members;
 - 26 3) that all such associations making an application have complete ownership of
27 the system and the necessary assets;
 - 28 4) that every customer is a member/owner with equal voting rights and that each
member is or will be a customer;

- 1 5) that the service area involved encompasses a fixed territory which is not
2 within the service area of a municipal utility or public service corporation, or
3 if it is, that the municipal utility or public service corporation is unable to
4 serve;
- 5 6) that there is a prohibition against further sub-division evidenced by deed
6 restrictions, zoning, water restrictions, or other enforceable governmental
7 regulations; and
- 8 7) that the membership is restricted to a fixed number of customers, actual or
9 potential.

10 13. Shortly after issuing its policy directive in Decision No. 55568, the Commission
11 directed Staff to resolve future requests for adjudication by issuing advisory letters. Until recently,
12 Staff has followed this practice, but Staff now believes that it is preferable for adjudication matters to
13 be resolved in a formal Commission proceeding.

14 14. Staff testified at the hearing that it had reviewed the criteria set forth in Decision No.
15 55568, and had reviewed the Application and accompanying documentation. Based on that review,
16 Staff stated that the Application meets the Commission's criteria for being adjudicated not a public
17 service corporation, and recommended that the Commission grant the Application.

18 15. Staff's Consumer Services witness testified at the hearing that, prior to the filing of the
19 Application, Consumer Services had received an informal complaint regarding Red Rock made by
20 Ms. Dobson. Staff's witness stated that when this docket was opened, Staff filed materials that Ms.
21 Dobson submitted to Consumer Services, relating to the informal complaint, in this docket.¹ Staff's
22 witness stated that Staff understood Ms. Dobson's informal complaint to be related to a billing of
23 \$300 she received without being given details as to what the \$300 was for. Staff's witness testified
24 that the informal complaint should not bar the Commission's granting of the Application.

25 16. A Proposed Opinion and Order adopting Staff's recommendation to grant the
26 Application was docketed on May 21, 2002.

27 17. On May 29, 2002, Ms. Dobson filed a letter in this docket indicating her disagreement
28 with the Proposed Opinion and Order.

18. The Commission considered, but did not vote upon, the May 21, 2002, Proposed

¹ Those documents, the content of which are described in Findings of Fact No. 3 above, were considered as public comment for purposes of the hearing, as Ms. Dobson had not requested intervention.

1 Opinion and Order at an Open Meeting of the Commission on June 4, 2002.

2 19. On June 5, 2002, a Procedural Order was issued in this matter scheduling a procedural
3 conference for June 13, 2002 to discuss the procedural posture of this case.

4 20. On June 12, 2002, Applicant filed a Supplemental Submission in Support of
5 Application for an Adjudication Not a Public Service Corporation ("First Supplemental
6 Submission"). Applicant's First Supplemental Submission included as exhibits the following: 1) a
7 copy of a June 10, 2002 letter from Chuck Coulter, President of Red Rock, responding to Ms.
8 Dobson's letter to the Commission dated May 22, 2002;² 2) a list of the shareholders of Red Rock as
9 of June 1, 2002; 3) a copy of the minutes of the January 8, 2002 Annual Meeting of Red Rock; and
10 4) a June 11, 2002 declaration of Steven R. Owens, Esq., who served as counsel to Red Rock.

11 21. On June 13, 2002, Ms. Dobson filed a request to intervene in this docket. In the
12 request, Ms. Dobson stated that her interest in this case is as a "customer/'shareholder'" of Red Rock.
13 Ms. Dobson further stated in her intervention request that she had several concerns, but that her major
14 issue was her belief that the Commission should regulate a company that is unwilling to provide the
15 people it serves with financial reasons for the costs they are bearing.

16 22. The procedural conference was held as scheduled on June 13, 2002. Ms. Dobson
17 attended the procedural conference telephonically. After the parties addressed Ms. Dobson's late
18 intervention request, Ms. Dobson was granted late intervention in this matter during the procedural
19 conference.

20 23. During the June 13, 2002, procedural conference, the parties all agreed that
21 establishing a briefing schedule would be appropriate to allow the parties to address legal issues and
22 to provide further comment on the issues.

23 24. A Procedural Order was issued on June 26, 2002 requiring the parties to file, by July
24 18, 2002, briefs on the following issues raised by Ms. Dobson: the books and records of the Red
25 Rock Water Cooperative, Inc. being made available to its members; the availability of regular
26 financial reports of the Red Rock Water Cooperative, Inc.; the reason for the increase in the Red

27 _____
28 ² The May 22, 2002 dated letter from Ms. Dobson was docketed with the Commission on May 29, 2002, and is referenced
in Findings of Fact No. 17 above.

1 Rock Water Cooperative, Inc.'s assessments; whether the increase in those assessments was
2 explained to the Red Rock Water Cooperative, Inc.'s members; regular water testing by the Red Rock
3 Water Cooperative, Inc.; and on any additional issues raised in Applicant's First Supplemental
4 Submission.

5 25. The June 26, 2002 Procedural Order also ordered that Staff's initial brief include the
6 issue of the general nature of applications for adjudication not a public service corporation, and
7 Staff's policy views on such adjudications.

8 26. Staff filed its brief on July 18, 2002.

9 27. On July 26, 2002, Applicant filed its responsive brief, adopting and joining in Staff's
10 July 18, 2002 brief.

11 28. Also on July 26, 2002, Applicant filed a Second Supplemental Submission in Support
12 of Application for an Adjudication Not a Public Service Corporation ("Second Supplemental
13 Submission"). Applicant's Second Supplemental Submission addressed the availability of the books
14 and records of the Applicant to its shareholders, the reason for any increase in assessments, and
15 whether the increase was communicated to the shareholders and the manner of communication. The
16 Second Supplemental Submission included exhibits as follows: 1) a July 3, 2002 declaration of Kay
17 Holland, the secretary/treasurer of Red Rock; and 2) a July 11, 2002 declaration of Jay Elmer, past
18 president of Red Rock.

19 29. Ms. Dobson filed a responsive brief on July 26, 2002.

20 30. Staff's brief, which was adopted by and joined in by Applicant, addressed
21 Commission precedent regarding requests for adjudications not a public service corporation,³ relevant
22 case law on the issue of whether entities are public service corporations,⁴ and the intent of the framers

23 ³ Commission Decision No. 41040 (December 11, 1970); Commission Decision No. 48902 (April 20, 1978); Commission
24 Decision No. 50917 (May 6, 1980, reversing Commission Decision No. 46501 (October 23, 1975)); Commission
25 Decision No. 54641 (August 7, 1985); Commission Decision No. 54922 (March 6, 1986); Commission Decision No.
26 55235 (October 16, 1986); Commission Decision No. 55539 (April 23, 1987); Commission Decision No. 55347
(December 17, 1986); and Commission Decision No. 55412 (February 12, 1987). Since the time Staff's brief was filed,
the Commission issued Decision No. 65055 (July 26, 2002) granting an application filed by Christopher Creek Estates
Ass'n., for adjudication not a public service corporation.

27 ⁴*Van Dyke v. Geary*, 244 U.S. 39 (1917); *Southwest Gas Corp. v. Arizona Corp. Comm'n.*, 169 Ariz. 279, 818 P.2d 714
(1991); *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 219 P.2d 324 (1950); *General Alarm v. Underdown*, 76
28 Ariz. 235, 262 P.2d 671 (1953); *Arizona Corp. Comm'n v. Nicholson*, 108 Arizona 317, 497 P.2d 815 (1972); *Arizona
Water Co. v. Arizona Corp. Comm'n.*, 161 Ariz. 389, 778 P.2d 1285 (App. 1989).

1 of the Arizona Constitution in drafting Article 15, Section 2 of the Arizona Constitution, which
 2 defines a public service corporation.⁵ Based on its legal review, Staff is of the opinion that Red Rock
 3 is not a public service corporation, and that granting Red Rock's application would be consistent with
 4 the Commission's prior actions on similar matters. Staff also stated in its brief that the declarations
 5 contained in Applicant's First and Second Supplemental Submissions fully address the issues raised
 6 by Ms. Dobson. Staff therefore recommended that the Commission grant the Application.

7 31. In Ms. Dobson's responsive brief, Ms. Dobson listed her two primary concerns as
 8 follows: "1) that the Board of Red Rock Water CoOp has not conducted itself in a professional
 9 manner as members of a corporation that is accountable to the members it serves, and thus do not
 10 deserve to be adjudicated. And 2) the Board has failed to provide specific financial details as to the
 11 reason/s for assessments and rate increases." Dobson Brief at 1 (emphasis in original).

12 32. Ms. Dobson listed in her brief several instances of her past experiences in interacting
 13 with the Board of Red Rock, stating that the "behaviors represent a lack of courtesy, professionalism
 14 and good financial judgment on the part of the Board members." Dobson Brief at 3. Ms. Dobson
 15 stated her belief that "people who behave in such a manner should [not] be given free rein with
 16 regard to providing water to neighbors, *whether or not they are a public service corporation*",
 17 Dobson Brief at 3 (emphasis in original), and that the Board of Red Rock does not "deserve the right
 18 to operate a neighborhood well independently regardless of whether they claim they are not a public
 19 service corporation." Dobson Brief at 4. Ms. Dobson's brief did not otherwise address the legal
 20 issues attendant to a determination of whether or not Red Rock is a public service corporation.

21 33. None of the parties briefed the issue raised by Ms. Dobson of regular water testing.
 22 However, ~~counsel for Staff stated at the June 13, 2002 procedural conference~~ that regular water
 23 testing is a matter that is within the province of the Arizona Department of Environmental Quality
 24 ("ADEQ"), and that it is Staff's understanding that Red Rock's system is below the threshold where

25 ADEQ testing is ^{normally} required.

26 ~~24. ADEQ has the discretion to require water testing~~

34. Red Rock meets all the criteria for evaluation of applications for adjudication not a

27
 28 ⁵ Remarks of Delegate Lynch, reprinted in *The Records of the Arizona Constitutional Convention of 1910* at 613-615 (John S. Goff, ed., 1991).

1 public service corporation provided by the policy directive issued in Decision No. 55568 in the
2 following manner:

- 3 1) Red Rock is a nonprofit corporation formed by the property owners in the
4 requested adjudication area.
- 5 2) A majority of the membership of Red Rock has signed a petition requesting
6 approval of the application. Ten of the eleven members of Red Rock signed
7 the petition attached to the application. One Red Rock member, Ms. Deborah
8 A. Dobson, did not sign the petition. Ms. Dobson filed public comments in
9 this docket on several occasions, but did not appear at the hearing. Ms.
10 Dobson requested late intervention on June 12, 2002, which was granted on
11 June 13, 2002, and she participated in post-hearing briefing on the issues she
12 raised.
- 13 3) Red Rock has complete ownership of the system and necessary assets.
- 14 4) Every customer of Red Rock is a member/owner with equal voting rights, and
15 every member is or will be a customer.
- 16 5) Red Rock's service area encompasses a fixed area that is not within the
17 service area of a municipal utility or public service corporation.
- 18 6) County zoning prohibits further subdivision of the land parcels in the service
19 area with the exception of the parcel owned by Jay Elmer, which can be split
20 into two additional parcels.
- 21 7) Red Rock's membership is restricted to a fixed number of potential customers.
22 There are currently 11 taps on the Red Rock system, serving 18 people. Red
23 Rock's bylaws, adopted June 26, 2001, limit the number of taps on the system
24 to 14 and the number of people served to 24.

25 35. As Staff sets forth in its brief, an analysis of Red Rock under the eight factor test set
26 forth by the Arizona Supreme Court in *Natural Gas Service Co. v. Serv-Yu Cooperative*, 70 Ariz.
27 235, 219 P.2d 324 (1950) also supports a determination that Red Rock is not a public service
28 corporation. Red Rock satisfies one of the eight *Serv-Yu* factors for public service corporation
analysis, in that Red Rock deals with the service of a commodity, water, in which the public has
generally been held to have an interest. This is not a controlling factor, however, as the courts⁶ and
the Commission⁷ have found in a number of cases over the years.

⁶ See, e.g., *Nicholson*, 108 Ariz. at 319, 497 P.2d at 817.

⁷ See Commission Decision Nos. 41040; 48902; 50917; 54641; 54922; 55235; 55539; 55347; 55412; and 65055.

36. Ms. Dobson is opposed to the Commission's granting of the Application based on her individual belief that Red Rock's Board of Directors does not, in her words, "deserve the right to operate a neighborhood well independently regardless of whether they claim they are not a public service corporation." Dobson Brief at 4.

37. Ms. Dobson does not dispute that Red Rock meets the criteria established by the Commission and by the courts for determining whether a concern is a public service corporation under Arizona law.

38. Staff believes that Red Rock has fully addressed the issues raised by Ms. Dobson, and recommends that the Commission grant the Application.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of the Application.

2. Red Rock Water Cooperative, Inc., is not a public service corporation within the meaning of Article XV of the Arizona Constitution.

3. Notice of the Application was provided in accordance with law.

4. Staff's recommendation as set forth in Findings of Fact No. 38 above is reasonable and should be adopted.

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ORDER

IT IS THEREFORE ORDERED that the application of Red Rock Water Cooperative, Inc. for adjudication not a public service corporation is hereby granted.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of ____, 2002.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT
TW

1 SERVICE LIST FOR:

RED ROCK WATER COOPERATIVE, INC.

2 DOCKET NO.:

W-04052A-01-0794

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4 Steven R. Owens
Law Office of Steven R. Owens, PC
5 Ms. Elizabeth A. McFarland
25 Bell Rock Plaza, Suite A
6 Sedona, Arizona 86351-8804
Attorneys for Red Rock Cooperative, Inc.

7
8 Deborah A. Dobson
375 Mockingbird Lane
Sedona, Arizona 86336

9
10 Christopher Kempley, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
11 1200 West Washington Street
Phoenix, Arizona 85007

12
13 Ernest G. Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
14 1200 West Washington Street
Phoenix, Arizona 85007
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